NOTICE: THIS DECISION DOES NOT CREATE LEGAL PRECEDENT AND MAY NOT BE CITED EXCEPT AS AUTHORIZED BY APPLICABLE RULES.
See Ariz. R. Supreme Court 111(c); ARCAP 28(c); Ariz. R. Crim. P. 31.24.

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COURT OF APPEALS
DIVISION TWO

IN THE COURT OF APPEALS
STATE OF ARIZONA
DIVISION TWO

THE STATE OF ARIZONA, Appellee, v. JAMES DARRELL JOHNSON, Appellant.	)	2 CA-CR 2007-0268 DEPARTMENT A MEMORANDUM DECISION Not for Publication Rule 111, Rules of the Supreme Court

APPEAL FROM THE SUPERIOR COURT OF PIMA COUNTY

Cause No. CR-20054530

Honorable Deborah Bernini, Judge

AFFIRMED IN PART, VACATED IN PART
AND REMANDED

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P E L A N D E R, Chief Judge.

¶1 After a bench trial, the trial court found appellant James Darrell Johnson guilty of second-degree murder of his ex-wife. The court sentenced him to an aggravated term of twenty-two years' imprisonment. On appeal, Johnson raises three, sentencing-related issues. He contends, and the state concedes, that he must be resentenced because his waiver of a jury trial for the guilt phase of his proceedings did not also waive his right to have a jury determine whether any aggravating sentencing factors exist. In the two other issues raised, Johnson argues (1) the trial court erred in allowing evidence or argument on any aggravating factors because the state had failed to provide notice before trial of its intent to prove such factors at sentencing, and (2) double jeopardy principles preclude the state from trying to prove aggravating factors in a resentencing proceeding.

¶2 We agree with the state's concession that Johnson's sentence must be vacated and that, absent a valid waiver, he is entitled to a jury determination of any aggravating factors alleged by the state. In view of our remand of the case for resentencing, however, we find moot Johnson's argument about insufficient notice of alleged aggravating factors, and we reject his double jeopardy claim.

Background

¶3 Based on evidence that Johnson had killed his ex-wife by stabbing her numerous times, the state charged him with first-degree murder. Before trial, he waived his right to a jury. Johnson pled not guilty but also presented an insanity defense. After a four-

day bench trial, the court determined he was not entitled to a verdict of guilty but insane and found him guilty of the lesser-included offense of second-degree murder.

¶4 Immediately after the verdict was announced, the prosecutor asked the trial court to consider as an aggravating factor trauma to the victim's family and to allow two of her out-of-state relatives to testify on that subject while they were in town for the trial. He stated that, by waiving a jury trial, Johnson had also impliedly waived his right to have a jury consider and find any aggravating factors. Johnson objected to permitting the state to present testimony on aggravating factors at that particular time and also expressed some doubt about whether "a waiver of jury for trial is the same as a waiver for aggravating circumstances." The court, however, allowed the victim's relatives to testify, noting that Johnson was "not objecting to the presentation of aggravating factors since this was a bench trial" and that, "[h]ad this been a jury trial this would have been the time to do it as well."

¶5 Both before and at the sentencing hearing a month later, Johnson asserted that he should receive a mitigated or presumptive sentence because he was constitutionally entitled to have a jury determine any aggravating factors, he had not waived that right, and the state had failed to provide timely notice of the aggravating factors it sought to prove. At sentencing, the prosecutor expressed his willingness "to pick a jury" sometime later to determine aggravating factors but opined that Johnson was not entitled to that because of his prior waiver of a jury trial. The trial court implicitly overruled Johnson's objections by finding he was not prejudiced in his ability to cross-examine the state's witnesses on

aggravating factors. Therefore, the court allowed the state to proceed and ultimately found three aggravating factors: 1) a 1974 felony conviction for marijuana possession; 2) "[g]ratuitous violence" against the victim; and 3) "tremendous emotional and psychological harm" to the victim's family, particularly Johnson's two sons. As noted earlier, the court sentenced Johnson to an aggravated, twenty-two-year prison term.

Discussion

¶6 Each of the three issues Johnson raises presents constitutional questions related to his sentencing. We review "alleged constitutional violations de novo." *State v. McGill*, 213 Ariz. 147, ¶ 53, 140 P.3d 930, 942 (2006).

1. *Blakely* error

¶7 Johnson argues his sentence must be vacated because the trial court violated his Sixth Amendment right to a jury trial on aggravating factors used to increase his sentence beyond the presumptive prison term. *See Blakely v. Washington*, 542 U.S. 296, 301 (2004); *State v. Brown*, 209 Ariz. 200, ¶ 12, 99 P.3d 15, 18 (2004). The Court in *Blakely* ruled that, "'[o]ther than the fact of a prior conviction, any fact that increases the penalty for a crime beyond the prescribed statutory maximum must be submitted to a jury, and proved beyond a reasonable doubt.'" *Blakely*, 542 U.S. at 301, *quoting Apprendi v. New Jersey*, 530 U.S. 446, 490 (2000).[1] Before his bench trial, Johnson validly waived his right to a jury

[1]The trial court took judicial notice of, and found as an aggravating factor, Johnson's prior felony conviction in 1974 for marijuana possession. That conviction does not fall within A.R.S. § 13-702(C)(11), however, because it did not occur "within the ten years

trial on the issue of guilt but, as the trial court later noted, did not explicitly waive his right to have a jury determine aggravating factors for sentencing purposes. When he objected at sentencing on that basis, the court acknowledged "there was no formal waiver on the record specifically of *Blakely* factors when the Court took the waiver of jury trial." Nonetheless, finding that Johnson was able to cross-examine the witnesses on all relevant aggravation issues, the court allowed the state to proceed.

¶8 Contrary to its position below, the state now concedes, correctly, that Johnson's waiver of a jury trial on the issue of guilt or innocence was not also a valid waiver of his right to a jury trial on aggravating factors and, consequently, he "is entitled to be resentenced." *See State v. Brown*, 212 Ariz. 225, ¶¶ 14-18, 129 P.3d 947, 951 (2006)

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immediately preceding the date of the [instant] offense." For that reason, the state asserts, Johnson's prior conviction "could not have served as a basis for excepting [him] from the general rule that defendants are entitled to a jury trial on aggravating circumstances." *See State v. Aleman*, 210 Ariz. 232, ¶ 25, 109 P.3d 571, 579 (App. 2005) (under *Blakely* and *Apprendi* exception, trial court may find prior conviction as aggravating factor); *see also State v. Keith*, 211 Ariz. 436, ¶ 3, 122 P.3d 229, 229-30 (App. 2005). We do not necessarily agree with that assertion because a trial court may find a prior conviction to be an aggravating factor under the "catch-all" provision in § 13-702(C)(24) even though the conviction does not qualify under § 13-702(C)(11). *See Aleman*, 210 Ariz. 232, n.11, 109 P.3d at 580 n.11. Arguably, therefore, the trial court's *Blakely*-exempt finding of Johnson's prior conviction authorized the court to find other aggravating factors without violating the Sixth Amendment. *See State v. Martinez*, 210 Ariz. 578, ¶¶ 16, 26, 115 P.3d 618, 623, 625 (2005); *see also State v. Carreon*, 211 Ariz. 32, ¶¶ 5-7, 116 P.3d 1192, 1193 (2005). Our supreme court, however, has not addressed or decided whether the "catch all" provision in § 13-702(C) "violates due process," *State v. Glassel*, 211 Ariz. 33, n.18, 116 P.3d 1193, 1217 n.18 (2005), or "whether, in light of *Blakely*, it remains proper to rely on the 'catch all' aggravator to impose an aggravated sentence." *State v. Hampton*, 213 Ariz. 167, n.20, 140 P.3d 950, 966 n.20 (2006). Because of that open question and because the state conceded error and did not argue this issue, we do not address it.

(defendant's waiver of jury trial in plea agreement not waiver of jury trial on aggravating circumstances). Therefore, the trial court erred by rejecting Johnson's challenge to the sentencing proceeding and determining aggravating factors itself without first having obtained a valid waiver of jury trial on those factors. *See State v. Price*, 217 Ariz. 182, ¶ 10, 171 P.3d 1223, 1226 (2007) (sentence may be increased beyond presumptive term only if jury finds at least one aggravating factor beyond a reasonable doubt, court finds aggravating factor after defendant validly waives right to jury trial on such factors, or either judge or jury finds *Blakely*-exempt fact of prior conviction). Accordingly, we vacate Johnson's sentence and remand the case for resentencing.

2. Notice of aggravating factors

¶9 Johnson also contends the trial court violated his due process rights under the United States and Arizona Constitutions by permitting the state to prove aggravating factors at sentencing without having given him notice of those factors before trial. *See* U.S. Const. amend. V, XIV; Ariz. Const. art. II, § 4. In a finding the state has not challenged here or below, the trial court noted "there was not a formal document or pleading filed [by the state] alleging aggravating circumstances" in this case. Because of the lack of pretrial notice of the aggravating circumstances, Johnson asserts his "sentence must be vacated."

¶10 The state responds that Johnson's insufficient-notice argument is moot. We agree. Because we are granting Johnson the precise remedy he seeks by vacating his

sentence, his due process argument concerning lack of proper notice of aggravating factors is moot. *See State v. Henry*, 176 Ariz. 569, 589, 863 P.2d 861, 881 (1993).

¶11 Even if the argument were not moot, however, Johnson received notice before his sentencing hearing of the aggravating factors the state intended to prove.[2] His attorney acknowledged having received the state's sentencing memorandum, which set forth the alleged aggravating factors, two days before the hearing, and the state had also informed Johnson on the last day of trial that it planned to present evidence "as to the trauma this has caused and emotional harm to the victim's family, including the boys." The sentencing hearing was held one month later, giving Johnson adequate time to prepare. Thus, the notice Johnson received satisfied due process. *See State v. Jenkins*, 193 Ariz. 115, ¶ 21, 970 P.2d 947, 953 (App. 1998) (in second-degree murder case, notice of aggravating factors in state's presentencing memorandum satisfied due process); *State v. Marquez*, 127 Ariz. 3, 5, 617 P.2d 787, 789 (App. 1980) (no error when trial court sua sponte found aggravating circumstances from record even though "prosecutor had neither alleged nor attempted to separately prove" them); *State v. Ford*, 125 Ariz. 8, 9, 606 P.2d 826, 827 (App. 1979) (presentence report provided adequate notice of aggravating circumstances). *Cf. State v.*

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[2]We find misplaced Johnson's reliance on Rule 16.1(b), Ariz. R. Crim. P., which provides that "[a]ll motions shall be made no later than 20 days prior to trial." That rule applies to pre-trial motions, and Johnson cites no authority supporting his argument that it also applies to the state's notice of alleged aggravating factors. *See* Ariz. R. Crim. P. 31.13(c)(vi). Additionally, although Rule 15.1(i)(2), Ariz. R. Crim. P., imposes a notice requirement for aggravating factors in capital cases, the criminal rules contain no such requirement for noncapital cases.

Waggoner, 144 Ariz. 237, 239, 697 P.2d 320, 322 (1985) ("a defendant must receive notice before trial commences that the state intends to allege his release status to enhance punishment pursuant to A.R.S. § 13-604.01"); *State v. Nichols*, 201 Ariz. 234, ¶ 15, 33 P.3d 1172, 1176 (App. 2001) (recognizing "Arizona's traditional notice requirements for alleging sentence enhancements").

3. Double jeopardy

¶12 Last, Johnson contends that, because the trial court erred by allowing the state to prove aggravating factors at sentencing, double jeopardy principles prevent the state from attempting to prove the alleged aggravating factors again for resentencing purposes. He asserts that "jeopardy attached on . . . aggravating factors when the trial court began the aggravation phase of the trial." We review de novo whether double jeopardy precludes a new sentencing hearing. *See State v. Moody*, 208 Ariz. 424, ¶ 18, 94 P.3d 1119, 1132 (2004); *State v. Siddle*, 202 Ariz. 512, ¶ 7, 47 P.3d 1150, 1153 (App. 2002). We conclude double jeopardy does not bar resentencing here.

¶13 The Fifth Amendment provides that no person will "be subject for the same offense to be twice put in jeopardy of life or limb." U.S. Const. amend V. Our state constitution provides essentially the same protection against double jeopardy. *See* Ariz. Const. art. II, § 10; *Siddle*, 202 Ariz. 512, ¶ 7, 47 P.3d at 1153. "Double jeopardy prevents the government from prosecuting an individual more than once for the same offense." *State v. Ring*, 204 Ariz. 534, ¶ 26, 65 P.3d 915, 929 (2003). Generally, double jeopardy does

not apply to sentencing proceedings. *Id.* ¶ 27; *see also United States v. DiFrancesco*, 449 U.S. 117, 132 (1980). And it is well-settled that "a defendant can be resentenced following an appellate reversal of his or her original sentence." *Ring*, 204 Ariz. 534, ¶ 33, 65 P.3d at 930.

¶14 Equating the trial court's *Blakely* error with "an acquittal based on presentation of insufficient evidence," *see Burks v. United States*, 437 U.S. 1, 11 (1978), Johnson contends that, if the case is remanded for resentencing, he "would be placed in jeopardy a second time when he was legally protected from an aggravated term during the first sentencing." We disagree. In *Monge v. California*, 524 U.S. 721, 728-29 (1998), "the United States Supreme Court held that the Double Jeopardy Clause does not preclude retrial on a prior conviction allegation in the noncapital sentencing context, even after a reversal based on insufficient evidence." *State v. Keith*, 211 Ariz. 436, ¶ 6, 122 P.3d 229, 230 (App. 2005).

¶15 In an attempt to distinguish *Monge*, Johnson maintains *Blakely* and *Apprendi* render it inapplicable to anything but prior convictions. According to Johnson, this case is more analogous to *Bullington v. Missouri*, 451 U.S. 430, 446 (1981), a capital case in which double jeopardy prevented a retrial on whether to impose the death penalty because the original sentencing hearing resembled "the trial on the question of guilt or innocence." But, as we noted in *Keith*, 211 Ariz. 436, ¶¶ 4-7, 122 P.3d at 230-31, *Apprendi* and *Blakely* did not overrule *Monge*, which controls in the noncapital resentencing context. And the

situation in *Bullington* was essentially the same as that presented in *Arizona v. Rumsey*, 467 U.S. 203, 211-12 (1984), in which the Court concluded that a capital defendant originally sentenced to life in prison could not later be resentenced to death.

¶16 In contrast, even in the capital case context, when a defendant was originally sentenced to death but that sentence was vacated on appeal, a resentencing to death does not violate double jeopardy. *Poland v. Arizona*, 476 U.S. 147, 154-57 (1986); *see also State v. Tucker*, 215 Ariz. 298, ¶ 43, 160 P.3d 177, 191 (2007); *Ring*, 204 Ariz. 534, ¶¶ 25, 36-38, 65 P.3d at 928-29, 931. In *Ring*, our supreme court concluded that jeopardy had not attached when the defendants had already been sentenced to death at the original sentencing hearing. *Ring*, 204 Ariz. 534, ¶ 38, 65 P.3d at 931. Similarly, a remand of this case for resentencing is constitutionally permissible because Johnson was not "actually or impliedly 'acquitted' in the first instance" of any aggravating factors. *Id*. ¶ 33. Rather, the trial court stated it found "the aggravating factors . . . have been proven beyond a reasonable doubt" and, on that basis, imposed an aggravated sentence. Thus, even if capital case law were pertinent here, as in *Ring*, a resentencing will not violate double jeopardy because Johnson was not "acquitted" of any of the alleged aggravating factors in the first hearing. *See id*. ¶¶ 33, 38.

¶17 Additionally, Arizona courts in numerous cases have countenanced a defendant's resentencing, without finding any double jeopardy violation, after the original sentence was vacated due to *Blakely* error. *See, e.g., Price*, 217 Ariz. 182, ¶ 23, 171 P.3d

at 1228; *State v. Gomez*, 211 Ariz. 494, ¶ 37, 123 P.3d 1131, 1139 (2005); *State v. Barr*, 217 Ariz. 445, ¶ 2, 175 P.3d 694, 696 (App. 2008); *State v. Barraza*, 217 Ariz. 44, ¶ 9, 170 P.3d 293, 295 (App. 2007); *Nikont v. Hantman*, 211 Ariz. 367, ¶ 4, 121 P.3d 873, 874 (App. 2005). And our courts in other cases have found that impaneling a second jury for sentencing purposes does not violate double jeopardy. *See State v. Hampton*, 213 Ariz. 167, ¶¶ 32-33, 140 P.3d 950, 958 (2006); *State v. Anderson*, 210 Ariz. 327, ¶ 85, 111 P.3d 369, 390 (2005).

¶18 Finally, Johnson's reliance on *State v. Choate*, 151 Ariz. 57, 725 P.2d 764 (App. 1986), is similarly unavailing. There, this court determined, after remanding the case for resentencing, that impaneling a new jury to retry the defendant on a dangerous-nature allegation would violate double jeopardy because the jury had been dismissed without the defendant's consent and without having reached a verdict on one of the charges. Under those circumstances, this court stated, "[t]he failure to submit a charge and the subsequent dismissal of the jury after it had resolved other charges" precluded retrial. *Id*. at 58, 725 P.2d at 765.

¶19 Unlike *Choate*, however, this case does not involve a trial court's mistakenly failing to submit a charge to a jury. *Id*. The trial court's finding of aggravating factors in this case, though procedurally flawed, does not mean "jeopardy has attached [to] bar[] retrial" of those factors. *Id*. And to the extent *Choate* might suggest otherwise, it predated *Monge* which, as noted above, permits resentencing proceedings in noncapital cases without

violating double jeopardy principles. In sum, a remand of this case for trial on aggravating factors for resentencing purposes is not barred by double jeopardy.

Disposition

¶20 Johnson's conviction is affirmed, but his sentence is vacated and the case is remanded for resentencing in accordance with this decision.

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JOHN PELANDER, Chief Judge

CONCURRING:

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JOSEPH W. HOWARD, Presiding Judge

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J. WILLIAM BRAMMER, JR., Judge